UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DENNIS H. DAY, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	)	DOCKET NUMBER SE-0752-94-0737-C-1 DATE: MAY 1, 1998

Dennis H. Day, Mountain Home, Idaho, pro se.

Captain Scott S. Driggs, Esquire, Mountain Home Air Force Base, Idaho, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant petitions for review of the January 15, 1997 compliance initial decision that denied his petition for enforcement of a settlement agreement. For the reasons set forth below, we GRANT the petition for review, REVERSE the portion of the compliance initial decision that found the agency had met its obligation to provide the appellant with retained pay, AFFIRM the remainder of

the compliance initial decision, and REMAND the matter to the field office for further adjudication.

BACKGROUND

The appellant filed a timely appeal from the agency's decision to remove him from his GS-9 Supervisory Art Specialist position based on charges of misconduct. *See* Initial Appeal File (IAF), Tab 4, Subtabs 4A, 4B, 4E. The parties entered into a settlement agreement that provided for, *inter alia*, cancellation of the removal, the appellant's reassignment to a WG-7 position with GS-9 pay retention, step increases and other adjustments at the GS-9 level, back pay, and withdrawal of the appeal. IAF (I-2), Tab 3. The appellant later filed a petition for enforcement of the settlement agreement, alleging that the agency had not provided him with the right amount of interest on back pay, had not given him a time-off award, and had not provided him with a step increase or locality adjustments. The agency contended that after it attempted to implement the agreement, it determined that it could not lawfully provide pay retention and step increases at the GS-9 level. Compliance File (CF), Tab 8. The administrative judge found the agency in full compliance with the agreement, holding that the agency's apparent repudiation of the pay provision did not amount to non-compliance as of the date of the compliance initial decision. The administrative judge suggested that, if the agency had misgivings about paying the appellant at the GS-9 level while assigning him WG-7 duties, it could simply reassign him to a GS-9 position. CF, Tab 12.

The appellant has filed a timely petition for review in which he claims that the agency is in breach of its promise to provide GS-9 pay retention, step increases, and locality adjustments. He does not contest the administrative judge's disposition of the back pay and time-off award issues. Petition for Review File (PRF), Tab 1. The agency opposes the petition for review, and again states that it cannot comply with the portion of the agreement relating to GS-9 retained

pay, step increases, and other adjustments. The agency asks that the settlement agreement be set aside. PRF, Tab 3.

ANALYSIS

The disputed clause of the settlement agreement, paragraph 2.d., provides as follows:

> [The agency agrees] to reassign Appellant from his former position as Arts & Crafts Specialist Supervisor ... to the currently vacant position of Woodworker Packer, a WG-7 [position] ..., effective 1 June 1995. Appellant will receive pay retention based on his former GS-9 position and shall receive applicable GS-9 step increases and scheduled pay changes/increases upon obtaining satisfactory job performance ratings. ...

IAF (I-2), Tab 3 at 2.

Under pay retention, an employee does not receive periodic step increases or locality adjustments authorized by 5 U.S.C. §§ 5304 & 5335. Instead, the employee's rights are governed by 5 U.S.C. § 5363(a), which provides that the employee will receive his "former rate of basic pay," plus "50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay if such allowable former rate exceeds such maximum rate for such grade." Thus, as pointed out by the agency, *see* PRF, Tab 3, the parties agreed to provide the appellant with certain benefits -- pay retention, as well as step increases and locality adjustments -- that, in combination, are not authorized by statute. When the agency saw the difficulty with the agreement, it provided the appellant with grade retention, under which the appellant can receive periodic step increases and locality adjustments. Grade retention is authorized for just two years, however, after which it converts to pay retention. *See* 5 U.S.C. § 5362; CF, Tab 7 at 2. The agreement in any event does not provide for grade retention, and the agency states that it withdrew grade retention because it realized that this benefit did not meet the terms of the settlement agreement. *See* PRF, Tab 3 at 2.

We find, based on the undisputed evidence and the agency's own admission, *see* PRF, Tab 3 at 1-2, that the agency is in breach of paragraph 2.d. of the settlement agreement. The portion of the compliance initial decision that found the agency had met its obligations under paragraph 2.d. is REVERSED.

Ordinarily, when an agency is in breach of a settlement agreement, the appellant has the option of enforcing the agreement, or rescinding the agreement and reinstating the underlying appeal. *See Fuller v. U.S. Postal Service*, 45 M.S.P.R. 611, 614 (1990). That option is not available here, however, because, as explained above, paragraph 2.d. of the settlement agreement provides for a combination of benefits that is not authorized by law. Accordingly, paragraph 2.d. cannot be enforced before the Board. *See Stipp v. Department of the Army*, 61 M.S.P.R. 415, 420 (1994) ("[T]he Board lacks authority to enforce an agency's agreement to make payments which are not authorized by statute."); *see also In re Ragunas*, 68 Comp. Gen. 97 (1988) (regardless of what the agency promised an employee, it could not be forced to provide retained grade and pay benefits that were not consistent with statute).

Although the agency asks that the settlement agreement be set aside, rescission of the agreement would not be appropriate at this stage. We acknowledge that in *Stipp* the Board ordered rescission of a settlement agreement on the ground that the parties were mutually mistaken about the legality of one of its provisions. There, however, the Board expressly found that the unlawful provision was a "principal term" and "material to the agreement." *See* 61 M.S.P.R. at 420; *see also Townsel v. Tennessee Valley Authority*, 33 M.S.P.R. 456 (1987) (a settlement agreement may be set aside on the basis of mutual mistake of "material" fact). In this case, by contrast, it is not immediately clear that the parties' mistaken belief that the appellant could receive step increases and locality adjustments while on pay retention was material. *See As'Salaam v. U.S. Postal Service*, 65 M.S.P.R. 417, 421 (1994) (a mistake of fact is "material" if it

involves a "basic assumption" underlying an agreement), *appeal dismissed*, 47 F.3d 1184 (Fed. Cir. 1995) (Table); *Miller v. Department of Defense*, 45 M.S.P.R. 263, 268 (1990) (a settlement term was found to be "material" where it was "central to the agreement and numerous other provisions of the agreement [were] dependent upon it").

More important, the appellant seeks enforcement of the settlement agreement, but he has not asked for rescission in the event that paragraph 2.d. is found to be unlawful. *See* PRF, Tab 1. The appellant, who is the master of his petition for enforcement, now knows that paragraph 2.d. cannot be enforced. If he wishes to argue that the provision for step increases and locality adjustments was a material term, and that the agreement should be rescinded based on mutual mistake as in *Stipp*, he may do so. Considering the length of time that has passed since the parties entered into the settlement agreement (nearly three years), and considering the fact that the parties appear to have performed all of their obligations under the agreement with the exception of the portion of paragraph 2.d. relating to pay, the appellant may wish not to have the agreement rescinded and the appeal reinstated. Under the circumstances we will not force rescission on him. *Cf.* 17 C.J.S. § 289 (the general rule is that a contract which is otherwise lawful is not invalid merely because it contains an unlawful promise; this rule takes on added significance when there has been partial performance of the legal parts). We see no impediment to severing the unenforceable portion of paragraph 2.d. -- specifically, the part that requires step increases and locality adjustments -- from the rest of the agreement, and enforcing the rest of the agreement. *See id*. (a court often chooses to enforce the portions of a contract that can be enforced, despite other contract terms that cannot be given effect because of illegality); Corbin on Contracts § 1520 (a contract containing an illegal term may be enforced in part by severing the illegal term from the rest of the agreement).

This case bears some resemblance to *Gullette v. U.S. Postal Service*, 70 M.S.P.R. 569 (1996). There, the appellant could not obtain enforcement of a particular settlement term as she reasonably interpreted it because enforcement would violate a collective bargaining agreement. Although she was entitled to rescission of the agreement, rescission was not forced on her. Rather, she was given the option of rescinding the agreement and reinstating the appeal, or accepting the agreement under the agency's interpretation, that is, not having the disputed settlement term enforced as she reasonably understood it. Similarly, in this case the appellant cannot obtain compliance with paragraph 2.d. insofar as it obligates the agency to provide him with step increases and locality adjustments, but he should not be forced to have the agreement rescinded if he is content to have the remainder of the agreement, including pay retention, enforced. The appeal must be remanded to allow the appellant to choose a course.

Two final points deserve discussion. The agency contends that paragraph 2.d. of the settlement agreement is entirely unlawful because it mandates that the appellant receive a GS-9 salary while performing WG-7 work. *See* PRF, Tab 3 at 2-3. According to the agency, paragraph 2.d. violates 5 U.S.C. § 5301, which provides that "[i]t is the policy of Congress that Federal pay fixing for employees under the General Schedule be based on principles that ... there be equal pay for substantially equal work within each local pay area ... ." We disagree. Section 5301 by its own terms is a policy underlying the federal pay system, not an ironclad rule mandating absolute uniformity in pay among all individual employees engaged in similar work. Pay retention, grade retention, and periodic step increases illustrate this point; all of these entitlements, which Congress itself authorized, can result in employees who do identical work receiving dissimilar salaries. Moreover, the agency's argument rests on a faulty factual premise; the appellant will be paid less than an employee holding a GS-9 position, as the formula limiting pay increases for employees on pay retention

makes clear. *See* 5 U.S.C. § 5363(a). Simply put, section 5301 does not bar an agency from agreeing to provide an employee with pay retention in settlement of litigation, where pay retention itself is authorized by statute and is routinely afforded to employees adversely affected by reorganizations (upon the expiration of grade retention). The shortcoming in the settlement agreement was not the provision for GS-9 pay retention, but the additional commitments the agency made that are not consistent with pay retention.

With respect to the administrative judge's suggestion that the agency could alleviate any problem in implementing the settlement agreement by assigning the appellant to a GS-9 position, it is sufficient to note that the agency did not agree to assign the appellant to a GS-9 position.

ORDER

The portion of the compliance initial decision that found the agency in compliance with paragraph 2.d. is REVERSED. The remainder of the compliance initial decision, which is unchallenged, is AFFIRMED. The matter is REMANDED to the Seattle Field Office. On remand, the appellant may argue that the agreement should be rescinded based on a mutual mistake of material fact; if the administrative judge agrees, then the administrative judge should order rescission of the agreement and reinstatement of the appeal, as in *Stipp*. If the appellant does not so argue, and prefers instead to have the unlawful portion of paragraph 2.d. severed from the rest of the agreement, then the administrative judge shall order the agency to comply with the portion of paragraph 2.d. requiring the provision of pay retention.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.